Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B-02-714 OF 1998

GOPAL SRI RAM, SITI NORMA YAAKOB AND MOKHTAR SIDIN JJCA

24 JULY 1999

Civil Procedure *— Abuse of process — Circumstances in which court's process may be abused — Whether categories of abuse of process closed — Whether abuse of process includes use of interlocutory relief as instrument of oppression*

Civil Procedure *— Abuse of process — What constitutes abuse — Respondent using court process to by-pass established procedure, impede appellants, nullify consent order, interfere with jurisdiction of court of co-ordinate jurisdiction and choosing inconvenient forum — Whether amounts to abuse of process*

Civil Procedure *— Appeal — Interference by appellate court — Trial judge paying insufficient regard to historical background of case and other considerations — Trial judge failing to exercise discretion in accordance with law — Whether interference by appellate court warranted*

The first respondent, a housing developer, entered into an agreement with the first appellant, of which the second appellant was the managing director. The agreement was in the form prescribed by the Architects Association of Malaysia ('the PAM form of contract') and carried within it an arbitration clause. Disputes arose and acting on the said clause, the parties referred their disputes to an arbitrator. On 1 June 1998, while the arbitration was on foot, the first appellant took out an originating summons before the High Court at Penang ('the first action') and obtained an ex parte Mareva injunction freezing the contractual retention sum in the hands of the respondent. On 24 June 1998, the parties appeared before the arbitrator where the respondent objected to the arbitrator on the ground of bias. The objection failed and the respondent on 7 July 1998, took out an originating summons in the High Court at Penang ('the second action') in which the respondent obtained an ex parte injunction restraining the arbitrator from proceeding with the arbitration. At the hearing of the first action on 2 July 1998, counsel for both sides appeared and obtained a consent order under which terms the respondent was to deposit the retention sum into a joint account in the names of the parties' respective solicitors. The sum was to be so held pending the resolution of the parties' disputes either through arbitration or litigation. On 27 August 1998, the respondent filed a writ and statement of claim in the High Court at Shah Alam ('the third action') against the appellants. The respondent further applied for and obtained an ex parte injunction restraining all proceedings in the first and second actions and an order directing, inter alia, that the retention sum held in the joint account be paid out to the respondent. The appellants subsequently took out two summonses to strike out the third action as

an abuse of process. Their applications were however dismissed and they appealed. A

Held, allowing the appeal:

(1) The circumstances in which the court's process may be abused are varied and numerous and the categories of such cases are therefore not closed. Whether the institution of an action or its continuation or a step taken therein amounts to an abuse of process, depends upon particular and individual circumstances. Where an action is found to be an abuse of the court's process, it may be struck out or stayed. If it is too late to do this, the party aggrieved may bring an action based upon the tort of abuse of process (see pp 645I–646A). B C

(2) Abuse of process in the context of a step taken in the proceedings would include the use of interlocutory relief as an instrument of oppression. It is plainly an abuse of the court's process where the relief at law or in equity is used, not to remedy a genuine grievance, but as an instrument of oppression. In such cases, the courts have always intervened and set the matter right (see p 647A–C). D

(3) On the facts, the respondent plainly abused the process of court not only in instituting the third action but in the steps it took therein. Several matters when taken together supported the conclusion that the respondent plainly abused the process of court, namely: E

(a) The respondent could have pursued the remedy made available by s 24(1) of the Arbitration Act 1952, which provision enables the High Court to remove an arbitrator who has misconducted himself. The proper procedure by which the High Court is to be moved for such relief is prescribed by Rules of the High Court 1980 O 69 r 2(1)(b). However, the respondent by-passed the established procedure by commencing the third action (see p 647D–F). F

(b) The respondent having obtained an order before the High Court at Penang in the second action prohibiting the arbitrator from adjudicating upon the dispute in question, obtained a further ex parte injunction in the third action restraining all proceedings in the second action. This caused the appellants to be in a position where they were unable to apply for a discharge of the restraining order and cut short the arbitration proceedings. This was clearly a case where injunctive relief was used as an instrument of oppression (see p 647G–H). G H

(c) The respondent having entered into a consent order in the first action that the retention moneys should be placed in a joint account nullified that order by obtaining the ex parte order in the third action whereby the retention moneys were I

to be released to it. By so doing, it by-passed the need for an inter partes application in the first action to have the consent order vacated. Had an inter partes application in the first action been made to vacate the consent order, the appellants would certainly have had an opportunity to appear and oppose it, and the respondents would have found it difficult to set aside the consent order (see pp 647I–648B).

(d) The orders granted in the third action by the High Court at Shah Alam had the effect of interfering with the power and jurisdiction of the High Court at Penang. Although the cases of *Tan Suan Choo v Majlis Perbandaraan Pulau Pinang* [1983] 1 MLJ 323 and *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533 as affirmed for their correctness in *Keet Gerald v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, are authority for the proposition that s 54 of the Specific Relief Act 1950, inter alia, deals with only permanent and not temporary injunctions and does not bar the grant of an injunction against a party to the action as opposed to one directed against the court, these authorities do not authorize one branch of the High Court to interfere with proceedings properly seized by another branch of the High Court (see p 648B–E).

(e) There was no good reason for the respondent to have approached the High Court at Shah Alam by way of the third action. (see p 648F–G). If the third action had indeed been necessary, it ought to have been instituted in the High Court at Malaya at Penang as that would have been the convenient forum. The High Court at Penang already seized of the first and second actions would have been in a far better position to deal with the third action as it was already advised of the nature of the dispute between the parties. The judge in the High Court at Shah Alam ought not to have entertained the third action and ought to have instead referred the matter to the Chief Justice of Malaya for directions under s 20 of the Courts of Judicature Act 1964 (see p 644G–645A).

(4) On the facts, the learned judge in the High Court at Shah Alam paid insufficient regard to the historical background of the matter and to several other considerations. This was accordingly a case where the judge had failed to exercise his discretion in accordance with law thereby warranting appellate interference (see pp 648I–649A).

[Bahasa Malaysia summary

Responden pertama, sebuah pemaju perumahan, telah memasuki satu perjanjian dengan perayu pertama, di mana perayu kedua adalah pengarah urusan. Perjanjian tersebut adalah di dalam bentuk yang diperuntukkan oleh Persatuan Arkitek Malaysia ('bentuk kontrak

PAM tersebut') dan mempunyai suatu fasal timbangtara. Pertikaian timbul dan atas dasar fasal tersebut, pihak-pihak telah merujuk pertikaian-pertikaian mereka ke seorang penimbangtara. Pada 1 Jun 1998, semasa timbangtara berterusan, perayu pertama telah mengeluarkan saman pemula di hadapan Mahkamah Tinggi Pulau Pinang ('tindakan yang pertma') dan memperolehi injunksi Mareva secara ex parte untuk membekukan jumlah wang tahanan kontrak di tangan responden. Pada 24 Jun 1998, pihak-pihak telah hadir di hadapan penimbangtara di mana responden membantah penimbangtara tersebut atas dasar berat sebelah. Bantahan tersebut gagal dan responden pada 7 Julai 1998, mengeluarkan saman pemula di Mahakamah Tinggi Pulau Pinang ('tindakan yang kedua') di mana responden memperolehi injunksi ex parte menghalang penimbangtara daripada meneruskan timbangtara tersebut. Semasa perbicaraan tindakan pertama pada 2 Julai 1998, peguam untuk kedua-dua belah pihak hadir dan memperolehi perintah persetujuan di mana responden akan mendepositkan jumlah wang tahanan ke dalam akaun bersama di atas nama peguam pihak-pihak yang berkenaan. Jumlah tersebut akan dipegang sehingga selesainya pertikaian pihak-pihak sama ada melalui penimbang tara atau litigasi. Pada 27 Ogos 1998, responden telah memfailkan writ dan pernyataan tuntutan di Mahkamah Tinggi Shah Alam ('tindakan yang ketiga') terhadap perayu. Selanjutnya, responden memohon dan memperolehi injunksi ex parte menghalang semua prosiding di dalam tindakan yang pertama dan kedua dan suatu perintah mengarahkan, antara lain, bahawa jumlah wang tahanan yang dipegang oleh akaun bersama dibayar kepada responden. Perayu kemudian mengeluarkan dua saman untuk mengetepikan tindakan yang ketiga tersebut sebagai penyalahgunaan proses. Permohonan mereka ditolak dan mereka merayu.

Diputuskan, membenarkan rayuan:

(1) Keadaan-keadaan di mana proses mahakmah boleh disalahguna adalah pelbagai dan banyak dan kategori-kategori kes-kes sebegini adalah tidak tertutup. Sama ada permulaan suatu tindakan atau berterusannya ia atau suatu langkah yang diambil terjumlah kepada suatu penyalahgunaan proses, bergantung kepada keadaan tertentu. Di mana suatu tindakan adalah didapati sebagai menyalahgunakan proses mahkamah, ia mungkin boleh dibatalkan atau ditangguh. Jika ia adalah terlalu lewat untuk berbuat demikian, pihak terkilan boleh membawa tindakan ini berdasarkan tort penyalahgunaan proses (lihat ms 645I–646A).

(2) Penyalahgunaan proses di dalam konteks suatu langkah yang diambil di dalam prosiding-prosiding akan termasuk penggunaan relief interlokutori sebagai suatu instrumen penindasan. Ia adalah jelas suatu penyalahgunaan proses di mana relief di sisi undang-undang dan ekuiti diguna, bukan untuk meremedikan rungutan yang sebenar, tetapi sebagai instrumen penindasan. Di dalam kes

A sebegini, mahkamah senantiasa campur tnagan dan membetulkan keadaan (lihat ms 647A–C).

(3) Berdasarkan fakta, responden telah dengan jelas menyalahgunakan proses mahkamah bukan sahaja di dalam memulakan tindakan yang ketiga tetapi di dalam langkah-langkah
B yang diambilnya. Beberapa perkara apabila dikumpul bersama menyokong kesimpulan bahawa responden dengan jelas menyalahgunakan proses mahkamah, iaitu:

(a) Responden boleh memohon remedi yang terbuka melalui s 24 (1) Akta Timbang Tara 1952, di mana peruntukan tersebut membolehkan Mahkamah Tinggi mengalihkan
C seorang penimbangtara yang telah salah laku. Prosedur yang yang patut betul di mana Mahkamah Tinggi boleh dipohon untuk relief sedemikian adalah diperuntukkan di dalam Kaedah-Kaedah Mahkamah Tinggi 1980 A 69 k 2(1)(b). Namun responden telah mengetepikan prosedur yang
D ditetapkan dengan memulakan tindakan yang ketiga (lihat ms 647D–F).

(b) Responden tersebut selepas memperolehi perintah di hadapan Mahkamah Tinggi Pulau Pinang di dalam tindakan yang kedua menghalang penimbangtara daripada mendengar pertikaian tersebut, telah memperolehi injunksi ex parte yang
E selanjutnya di dalam tindakan yang ketiga untuk menghalang semua prosiding di dalam tindakan yang kedua. Ini menyebabkan perayu-perayu di dalam keadaan di mana mereka tidak dapat memohon untuk menarik balik perintah menghalang dan memendekkan prosiding timbangtara. Ini
F adalah jelas suatu kes di mana relief injunksi telah digunakan sebagai instrumen penindasan (lihat ms 647G–H).

(c) Responden selepas memasuki perintah persetujuan di dalam tindakan pertama bahawa wang tahanan sepatutnya diletakkan di dalam akaun bersama telah membatalkan perintah tersebut dengan memperolehi perintah ex parte di
G dalam tindakan ketiga di mana wang tahanan patut diberikan kepadanya. Dengan berbuat demikian, ia telah mengetepikan keperluan untuk suatu permohonan inter partes di dalam tindakan pertama untuk mengalihkan perintah persetujuan tersebut. Jika terdapat suatu permohonan inter partes di dalam tindakan pertama untuk mengalihkan perintah
H persetujuan tersebut, perayu-perayu tentu mempunyai peluang untuk hadir dan menentangnya, dan responden-responden akan mendapat tahu bahawa adalah sukar untuk mengetepikan perintah persetujuan tersebut (lihat ms 647I–648B).

I (d) Perintah yang diberikan di dalam tindakan ketiga oleh Mahkamah Tinggi Shah Alam mempunyai kesan untuk campurtangan dengan kuasa dan bidang kuasa Mahkamah Tinggi Pulau Pinang. Walupun kes-kes *Tan Suan Choo v*

Majlis Perbandaraan Pulau Pinang [1983] 1 MLJ 323 dan *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533 seperti yang disahkan kewajarannya di dalam *Keet Gerald v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 adalah autoriti-autoriti untuk cadangan bahawa s 54 Akta Relief Spesifik 1950 antara lain hanya berkaitan dengan injunksi kekal dan bukan sementara dan tidak menghalang pemberian injunksi terhadap suatu pihak di dalam tindakan berbanding dengan seseuatu yang diarahkan terhadap mahkamah, autoriti-autoriti ini tidak memberi kuasa kepada satu cabang Mahkamah Tinggi untuk menganggu prosiding yang sewajarnya dipunyai oleh suatu cabang Mahkamah Tinggi yang lain (lihat ms 648B–E).

(e) Tidak terdapat alasan yang baik untuk responden memulakan tindakan di Mahkamah Tinggi Shah Alam melalui tindakan yang ketiga (lihat ms 648F–G). Jika tindakan ketiga adalah benar-benar perlu, ia sepatutnya dimulakan di Mahkamah Tinggi Malaya di Pulau Pinang oleh kerana ia adalah forum yang mudah. Mahkamah Tinggi di Pulau Pinang sudah pun mengendali tindakan pertama dan kedua adalah dalam keadaan yang lebih baik untuk mendengar tindakan yang ketiga oleh kerana ia telah pun tahu tentang bentuk pertikaian antara pihak-pihak. Hakim di Mahkamah Tinggi Shah Alam tidak patut melayan tindakan yang ketiga dan sebaliknya patut merujuk perkara tersebut kepada Hakim Besar Malaya untuk arahan di bawah s 20 Akta Mahkamah Kehakiman 1964 (lihat ms 644G–645A).

(4) Berdasarkan fakta hakim yang arif di Mahkamah Tinggi Shah Alam kurang memberi perhatian kepada latar belakang sejarah perkara tersebut dan juga beberapa pertimbangan yang lain. Ini adalah suatu kes di mana hakim telah gagal untuk melaksanakan budi biacaranya menurut undang-undang dan dengan itu mewajarkan gangguan mahkamah rayuan (lihat ms 648I–649A).]

Notes

For a case on abuse of process, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 6.

For a case on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 640.

Cases referred to

Bina Satu Sdn Bhd v Tan Construction [1988] 1 MLJ 533 (refd)
Castanho v Brown & Root (UK) Ltd & Anor [1981] AC 557 (refd)
Chee Kuan Cheng v Chou Kong Kah [1967] 2 MLJ 74 (refd)
Gilham v Browning & Anor [1998] 2 All ER 68 (refd)
Grovit & Ors v Doctor & Ors [1997] 2 All ER 417 (refd)

A *Keet Gerald v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 (refd)
Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 MLJ 425 (refd)
Motor Sports International Ltd (Servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd [1996] 2 MLJ 605 (refd)
B *Overseas Union Finance Ltd. v Lim Joo Chong* [1971] 2 MLJ 124 (refd)
Tan Suan Choo v Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323 (refd)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1 (refd)
Tsoi Ping Kwan v Loh Lai Ngoh & Anor [1997] 3 MLJ 165 (refd)

C **Legislation referred to**

Arbitration Act 1952 s 24(1)
Courts of Judicature Act 1964 s 20
Rules of the High Court 1980 O 69 r 2(1)(b)
Specific Relief Act 1950 s 54

D *RR Sethu* (*Lim Hock Siang* with him) (*Azman Davidson & Co*) for the appellant.
Mahadevi Nadchatiram (*Shanti Segaram* with her) (*Mahadevi Nadchatiram & Partners*) for the respondent.

E **Gopal Sri Ram JCA**:

Preliminary

This appeal is directed against the order of the High Court at Shah Alam dismissing the appellants' summons to strike out the respondent's suit on
F the ground that it was an abuse of the court's process. We heard the appeal on 3 May 1999, and, at the conclusion of arguments, allowed it.

When pronouncing the order of this court I said that this was one of the worst cases of an abuse of the process I had ever come across. Having re-read the appeal record for the purpose of writing this judgment I have found
G nothing to alter that view.

Facts and chronology

The respondent is a housing developer. On 1 June 1994, it entered into an agreement with the first appellant. It was an agreement in the form prescribed by the Architects Association of Malaysia. It is known to the
H profession as 'the PAM form of contract'. Under the agreement, the first appellant was to carry out certain infrastructure work for the respondent at a project site in Kulim, Kedah.

The second appellant is a consultant engineer. He is the managing director of the first appellant. According to the respondent's amended
I statement of claim, he is the alter ego of the first appellant.

Later, disputes arose over certain payments which the first appellant claimed was due to it from the respondent. The agreement which the parties

had entered into carried in it an arbitration clause. It is a clause commonly found in the PAM form of contract. Acting in accordance with that clause, the parties, on 9 October 1997, referred their disputes to an arbitrator. Pleadings were then exchanged. These comprised of the first appellant's points of claim, the respondent's points of defence and counterclaim as well as a reply from the first appellant.

On 1 June 1998, while the arbitration was on foot, the first appellant took out an originating summons before the High Court at Penang ('the first action') and obtained an ex parte Mareva injunction freezing the contractual retention sum in the hands of the respondent. The first appellant instituted the first action because an arbitrator does not have jurisdiction to grant injunctive relief.

On 24 June 1998, the parties appeared before the arbitrator. The respondent objected to the arbitrator conducting the arbitration on the ground of bias. The objection having failed, the respondent, on 7 July 1998, took out an originating summons ('the second action') in which it obtained an ex parte injunction restraining the arbitrator from proceeding with the arbitration. The second action was also filed in the Penang High Court.

At the hearing of the first action on 20 July 1998 counsel for both sides appeared and obtained a consent order under the terms of which the respondent was to pay the retention sum amounting to RM 575,000 into an account in the joint names of the parties' respective solicitors. This sum was to be held by the solicitors pending the resolution of the disputes between the parties either through arbitration or litigation.

On 27 August 1998, the respondent caused to be issued a writ and statement of claim (later amended) against the appellants. This suit, which I will refer to as 'the third action', forms the subject matter of the present appeal. There is one matter in regard to the third action which, I think, calls for comment. It has to do with the venue selected by the respondent for commencing it.

Despite the fact that the first and second actions were already pending before the High Court in Penang, the third action was filed in the High Court at Shah Alam. Why this change of venue was necessitated is not altogether clear. Counsel for the respondent informed us during argument that Shah Alam was chosen because the respondent's address for service is in the State of Selangor. But I find this explanation unconvincing. The fact that its address for service is in Selangor did not prevent the respondent from initiating the second action in Penang. In my view, if the third action was necessary at all; and I use the expression 'if necessary' advisedly; it ought to have been instituted in the branch of the High Court in Malaya at Penang as that would have been the convenient forum. After all, the branch of the High Court in that State was already seised of the first and second actions and would therefore have been in a far better position to deal with the third action as it was already advised of the nature of the dispute between the parties. In my judgment, the learned judge in the Court at Shah Alam should, by reason of history of the prior litigation between the parties before it, ought not to have entertained the third action. Instead, he ought

to have referred the matter to the Honourable, the Chief Judge of Malaya for the latter's directions under s 20 of the Courts of Judicature Act 1964, on the transfer of the third action to Penang.

Returning now to the factual narrative, on the very day the writ was issued, that is to say, 27 August 1998, the respondent took out a summons for interlocutory relief. I will, in a moment, mention the nature of the relief sought by the respondent. But I must make some observations about the summons itself.

The respondent's application was not marked as an ex parte summons. In fact it was, on its face, made returnable inter partes before the judge in chambers on 4 September 1998. However, for some inexplicable reason, it was heard ex parte on 27 August 1998.

The interlocutory relief granted ex parte by the learned judge on the respondent's summons include an injunction restraining all proceedings in the first and second actions and an order directing that the sum of RM575,000 held in the joint account pursuant to the consent order made in the first action be forthwith paid out to the respondent upon service of the ex parte order.

Later, the appellants then took out two summonses to have the third action struck out as an abuse of process. These applications were heard and dismissed by the learned judge.

So much for the factual background.

The law

It is trite that a person who has a legitimate grievance may invoke the court's process to obtain redress. But cases may arise where the true purpose for invoking the court's process is something other than to obtain a remedy provided by law. It may be to oppress a defendant. Or it may be to apply pressure upon him which the law regards as illegitimate. Or it may be to merely commence an action and let it hang over the head of the defendant with no intention of bringing it to a conclusion (see *Grovit & Ors v Doctor & Ors* [1997] 2 All ER 417). Or the plaintiff having commenced an action may take steps to discontinue it after the defendant has become dominis litis, thereby preventing the defendant from obtaining vindication through a judgment of the court. In the last instance, the court will refuse to permit discontinuance, or if a notice of discontinuance has been filed, will set it aside and direct the action to proceed (see *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124; *Castanho v Brown & Root (UK) Ltd & Anor* [1981] AC 557).

A fairly recent decision on the point is that of the English Court of Appeal in *Gilham v Browning & Anor* [1998] 2 All ER 68. It was a case where the defendant's discontinuance of his counterclaim before the county court was held to be an abuse of process. it was there held that whether in a particular case there was an abuse would be a question of fact and degree.

Since the circumstances in which the court's process may be abused are varied and numerous, the categories of such cases are therefore not closed.

Whether the institution of an action or its continuation or a step taken therein amounts to an abuse of process depends upon particular and individual circumstances. Where an action is found to be an abuse of the court's process, it may be struck out or stayed. If it is too late to do this, the party aggrieved may bring an action based upon the tort of abuse of process.

This court dealt with the point fairly recently in the context of the tort of abuse of process. It was in *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425. I there said (at p 434):

> Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.
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> The position has been neatly summed up by Lord Denning MR in his dissenting judgment in *Goldsmith v Sperrings Ltd & Ors* [1977] 1 WLR 478, where at p 489 he said:
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> > 'In a civilised society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.'
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> Though a dissenting judgment, the principle enunciated by the Master of the Rolls has been accepted as authoritative of what constitutes an abuse of process.
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> Sometime abuse can be shown by the very steps being taken in the courts. Take some instances from the law of libel. When a man sent a defamatory circular to seven different persons, and the party defamed brought seven different libel actions against the same defendant, one for each publication, all were stayed, save one, Erle J saying:
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> > '[T]he plaintiff has not alleged that any purpose would be obtained by the course he has already adopted, beyond imposing the cost of litigation on the defendant.'
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> See *Jones v Pritchard* (1849) 6 Dow & L 529 at p 530.
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> Again, where a pamphlet contained two different passages, each defamatory of a man, he brought two separate actions, one for each passage. He failed on the first. The second was stayed, Fry LJ saying: 'Such successive actions ... would be an abuse of the process of the court ...'. See *Macdougall v Knight* (1890) 25 QBD 1 at p 10.
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> At other times, the abuse can only be shown by extrinsic evidence that the legal process is being used for an improper purpose. On the face of it, in any particular case, the legal process may appear to be entirely proper and correct.

A What may make it wrongful is the purpose for which it is used. If it is done in order to exert pressure so as to achieve an end which is improper in itself, then it is a wrong known to the law.

Abuse of process in the context of a step taken in the proceedings would, in my judgment, include the use of interlocutory relief as an instrument of oppression. The law provides for remedies, both interim and final, to a litigant to set right, or to prevent, some harm or injury that has been done or may be reasonably apprehended. It is plainly an abuse of the court's process where relief at law or in equity is used, not to remedy a genuine grievance, but as an instrument of oppression. There have been instances before our courts where an interlocutory injunction has been found to have been used as an instrument of oppression. We have always intervened in such cases and set the matter right. See, for example *Motor Sports International Ltd (Servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605; *Tsoi Ping Kwan v Loh Lai Ngoh & Anor* [1997] 3 MLJ 165.

The present case

What remains is to apply the relevant principles to the facts of the present appeal. When that is done, I am driven to the conclusion that the respondent plainly abused the process of the court not only in instituting the third action but in the steps it took therein. There are several matters when taken together reasonably support that conclusion.

First, it is clear that if the respondent was genuinely unhappy with the conduct of the arbitrator, it could have pursued the remedy made available by s 24(1) of the Arbitration Act 1952. That provision enables the High Court to remove an arbitrator who has misconducted himself. The proper procedure by which the High Court is to be moved for such relief is prescribed by O 69 r 2(1)(b) of the Rules of the High Court 1980. The application should be by way of an originating motion supported by an affidavit. The appellants would be entitled to appear and be heard upon such an application. Here, the respondent bypassed the procedure established by law by commencing the third action.

Second, the respondent having obtained an order before the High Court at Penang in the second action prohibiting the arbitrator from adjudicating upon the dispute in question, obtained a further ex parte injunction in the third action restraining all proceedings in the second action. This bound the appellants hand and foot. They found themselves in the unenviable position of being unable to apply for a discharge of the restraining order obtained by the respondent in the second action. The arbitration proceedings were truncated without a single shot being fired in reply. The conduct of the respondent was, to say the least, entirely unconscionable in all the circumstances of the case. In my view, there can hardly be a clearer case where injunctive relief has been used as an instrument of oppression.

Third, the respondent having entered into a consent order in the first action that the retention monies should be placed in a joint account, nullified that order with a stroke of a pen. This it did by obtaining the

further ex parte order in the third action whereby the retention monies were to be released to it. By so doing, it bypassed the need for an inter partes application in the first action to have the consent order vacated. Had such an application been made, the appellants would most certainly have had an opportunity to appear and oppose it. And the respondent having entered into the consent order with open eyes, would have found it most difficult to surmount the obstacles that lay in its path in having that order set aside, especially since it was to the practical advantage to both parties. See *Chee Kuan Cheng v Chou Kong Kah* [1967] 2 MLJ 74.

Fourth, the respondent obtained orders in the third action that had the effect of staying the first and second action in the hands of the Penang High Court. This is a clear intrusion by one branch of the High Court into the conduct of proceedings that were plainly within the control and supervision of another branch. I am conscious of the decisions at first instance in the cases of *Tan Suan Choo v Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323 and *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533. These two cases are authority for the proposition that s 54 of the Specific Relief Act 1950 which, among other things, prohibits the grant of an injunction to stay proceedings in a court of co-ordinate jurisdiction, deals with only permanent not temporary injunctions and does not bar the grant of an injunction against a party to the action as opposed to one directed against the court. I am also aware that these decisions were affirmed for their correctness by this court in *Keet Gerald v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193. But I do not regard these cases as authorizing one branch of the High Court to interfere with proceedings properly seized by another branch. And I am unable to escape the conclusion in the present case that the orders granted in the third action, on their proper construction, in substance have the effect of interfering with the power and jurisdiction of the High Court at Penang. Particularly is this so in the case of the order that directs the payment out to the respondent of the retention monies in violation of the consent order in the first action. It is an order that is permanent and not merely temporary in effect.

Lastly, there is the matter of the change in the forum to which I have already adverted. There is no good reason for the respondent to have approached the High Court at Shah Alam by way of the third action. It was aware of the first and second actions that were pending before the Penang High Court. The manner in which the approach was made to the High Court at Shah Alam smacks of an abuse.

Most, if not all, of these arguments were presented to the learned judge by the appellants when they moved to strike out the third action. Unfortunately, the learned judge failed to properly appreciate the strength in the submissions made by the appellants to him. Instead, he took the rather simplistic approach by holding that there were serious questions to be tried and that the summary procedure was therefore not appropriate. In so holding, he plainly overlooked considerations that were materially relevant to the jurisdiction that he was invited to exercise. In particular, he paid insufficient regard to the historical background of the matter (see *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1) and the several

other considerations hereinbefore adumbrated. This was accordingly a case where it was amply demonstrated that the learned judge had failed to exercise his discretion in accordance with law thereby warranting appellate interference.

The result

For the reasons already given, the appeal was allowed. The third action was ordered to be struck out. All orders made therein were set aside. It was also ordered that the costs of the appeal and those in the court below be taxed on a solicitor client indemnity basis and that these be paid forthwith to the appellants. I realize that such an order for costs is not ordinarily made. It is usually reserved, in the discretion of this court, for the most exceptional of cases. Having regard to the conduct of the respondent, the present appeal is indeed such a case. The deposit lodged in court was ordered to be refunded to the appellants.

My learned sister Siti Norma Yaakob and my learned brother Mokhtar Sidin JJCA have seen this judgment in draft and agree with the reasoning and the conclusions therein.

Appeal allowed.

Reported by Andrew Christopher Simon